No. 407.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

BERNARD McGORRAY,
Appellant,

vs.

MYLES P. O'CONNOR, ET AL.,
Appellees.

APPELLANT'S BRIEF.

AMOS H. CARPENTER,
Solicitor for Appellant.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

BERNARD McGORRAY,
Appellant,
vs.
MYLES P. O'CONNOR, ET AL.,
Appellees.

STATEMENT OF THE CASE.

This is an action in equity, and was brought to redeem certain real property from a mortgage sale. C. W. Carpenter and C. K. Bailey were partners in farming and stock raising, and gave a mortgage of $10,000 to defendant O'Connor on a portion of their real estate. Afterward Carpenter died and left an alleged will, under the terms of which a large portion of his property was devised to the children of said C. K. Bailey, which said will was twice adjudged to be null and void by the Superior Court of San Joaquin county, California, by reason of the unsoundness of mind of the testator, and of fraud and undue influence exercised by the defendant, C. K. Bailey; but a new trial having been granted, the case was still pending in said court at the time of the commencement of this action. C. K. Bailey, the surviving partner, caused said mortgage to be fore-

closed for the purpose of defrauding the Carpenter heirs, and the land covered thereby was purchased at such sale by the defendant O'Connor, the mortgagee, for the amount of the note and costs, which was about one-third of its real value, with the understanding that it should be reconveyed to the said Bailey for the amount of the purchase price after Carpenter's heirs' time of redemption had expired.

Clinton H. Carpenter was an heir at law of C. W. Carpenter, and his successor in interest in respect to the land in controversy, and one of the contestants of said alleged will, and the defendant against whom a judgment was duly rendered and docketed in said Superior Court, so that it became a lien on said real property after said mortgage had been foreclosed. The complainant, who was the owner of this judgment against Clinton, tendered within the time allowed by law, to defendant Cunningham, the Sheriff who made the sale, the money necessary to redeem said property, which, at the instigation of defendants O'Connor and Bailey, and in collusion with them for the purpose of defrauding said heirs, he refused to receive. This action was then brought, and the defendants filed answers which were not accompanied by a certificate of counsel that they were well founded in point of law, as required by Rule 10 of the Rules of Practice of the United States Circuit Court. The complainant then moved to

strike said answer off the files on that ground, and also to strike out portions of said answers on the ground that such parts were sham, irrelevant, impertinent and conclusions of law, and also moved the Court for judgment on the pleadings.

On the 3d day of August, 1896, the Court denied complainant's motion to strike said answers off the files, and gave the defendants permission to amend their said answers by adding such certificate, and took said other motions of complainant under advisement.

On the 13th day of July, 1896, while complainant's motions were pending as aforesaid, the defendants moved the Court to set said cause for hearing on bill and answers, and the same was denied on the 3d day of August, 1896.

The defendants having failed and refused to amend their answers in accordance with the permission of the Court as aforesaid, the complainant again moved the Court on notice to strike said answers off the files, and for judgment for want of an answer, and the same was denied on the 31st day of March, 1897.

While all of complainant's motions were pending and submitted to the Court for decision as aforesaid, the defendants, without leave of Court, renewed their previous motion to set said cause for hearing on bill and answers, and the same was granted and a decree

was thereupon entered in favor of defendants. The complainant appealed.

SPECIFICATION OF ERRORS.

1.—It was error to deny complainant's second motion to strike the defendants' answers from off the files and allow a default, when said defendants had refused for several months to make such answers conform to the requirements of the rules of Court.

2.—It was error to deny complainant's motion to strike out the said several portions from the defendants' answers, the same being sham, irrelevant, impertinent and conclusions of law.

3.—It was error to entertain and grant defendants' second motion to set said action for hearing on bill and answers when once denied and renewed, without leave of Court, under the same circumstances as existed when first made.

4.—It was error to set said action down for hearing on bill and answers before the exceptions to such answers and the issues raised thereby were settled.

5.—It was error to set said action down for hearing on bill and answers without allowing the complainant three months, or a reasonable time after the disposal of

the exceptions to said answers and the settlement of the issues raised thereby, in which to take testimony in support of his bill.

6.—It was error to hold that complainant's said several motions were not made at the proper stage of the proceedings, and that they were made too late.

7.—It was error to deny complainant's motion for judgment on the pleadings.

8.—It was error to hold that all, or any part or portion, of the said several answers objected to by the complainant as sham, impertinent, irrelevant and conclusions of law, were proper or material allegations, because responsive to the bill of complaint.

9.—It was error to hold that the Sheriff, as an executive officer having no interest in the matter in controversy, had a right to deny the allegations of the bill, and thereby contest the complainant's right to redeem.

10.—It was error to hold that defendant O'Connor, the mortgagee, having no interest in the matter in controversy, save the amount invested in the mortgage note, had a right to deny the allegations of the bill, and thereby contest the complainant's right to redeem.

11.—It was error to hold that defendant O'Connor, the mortgagee, having made Clinton H. Carpenter a

party defendant to his action foreclosing the mortgage, and a defendant in execution therein, was not estopped from denying said Clinton and his creditors' right to redeem.

12.—It was error to hold that the title to C. W. Carpenter's interest in the real property of the firm of Bailey & Carpenter did not vest in Clinton H. Carpenter, one of his heirs at law, at the time of his death.

13.—It was error to hold that the title to C. W. Carpenter's interest in the real property of the firm of Bailey & Carpenter vested in C. K. Bailey, the surviving partner, and not in said Carpenter's heirs at law.

14. It was error to hold that Clinton H. Carpenter, as an heir at law of C. W. Carpenter, deceased, or his creditor had no interest in the mortgaged property of his late brother, and no right to redeem the same from the mortgage sale, because said estate had not been distributed to him as such heir.

15.—It was error to hold that Clinton H. Carpenter, as a defendant in the action of foreclosure, and a defendant in execution therein, or his creditor, had no right to redeem the mortgaged property.

16.—It was error to hold that a person, having either a vested or a contingent interest, however slight, in

mortgaged property, can not redeem it from a mortgage sale, if the mortgagee, or Sheriff making the sale thereof, objects to such redemption.

17.—It was error to render a decree in behalf of defendants on bill and answers, because all matters and allegations in said answers that were not responsive to the bill, or that were made on information or belief, or that were not positive, or that were allegations or denials of conclusions of law, could not be taken, treated or considered as evidence on such hearing.

18.—It was error to render a decree for the defendants upon bill and answer, after excluding from consideration those portions of said answers that were conclusions of law, irresponsive and not positive allegations and denials, and those allegations made on information or belief and leaving the material allegations of the bill and the charges of collusion and conspiracy therein contained undenied.

19.—It was error to refuse to allow the complainant to redeem, when such redemption could not injure the defendants, and a refusal thereof might jeopardize the complainant's judgment and Clinton's entire interest in his brother's estate.

ARGUMENT.

1.—Rule No. 10 of the Rules of Practice of the United States Circuit Court provides that "no demurrer, or "special plea, or answer to a complaint shall be allowed "to be filed, unless accompanied by a certificate of "counsel, that, in his opinion, it is well founded in point "of law." As the answers did not conform to the above rule, the complainant, on the 16th day of July' 1896, moved the Court to strike said answers from off the files and for a default. On the 3d day of August, 1896, the motion was denied, and leave was given said defendants to add such certificate. (Trans. pg. 83.) The defendants having refused to add said certificate, the complainant, on the 25th day of March, 1897, made affidavit of such refusal on the part of the defendants, and renewed, on notice, his motion to strike said answers from off the files and for a default. This motion was denied on the 31st day of March, 1897, and complainant excepted thereto. (Trans. 86) The rule is imperative that no answer shall be filed without such certificate, but, having been filed contrary to said rule, they should have been disregarded until corrected, in accordance with the permission granted by the Court. Such has been the penalty attached to the breach of similar rules.

Nat'l Bank vs. Ins. Co., 104 U. S., 54-76.

Hinds vs. Keith, 13 U. S. App., 314.
Secor vs. Singleton, 9 Fed. Rep., 809.

The defendants having refused to make their answers conform to the requirements of said rule, they should have been stricken from the files, a default should have been entered, and the complainant's bill taken *pro confesso*.

2.—The errors assigned under this paragraph can be ascertained only by an inspection of the original papers —except the denial of complainant's citizenship. (Trans. 29.) Such an objection cannot be raised at a trial on the merits. Defendants should have filed a plea in abatement.

Hartog vs. Memory, 116 U. S., 589.
Farmington vs. Pillsbury, 114 U. S., 143.
DeWolf vs. Raband, 1 Pet., 476.

3.—On the 13th day of July, 1896, the defendants moved the Court to set the action down for hearing on bill and answers, and on the 3d day of August, 1896, said motion was denied by Judge McKenna on the ground that the issues were unsettled. (Trans. 93.)

On the 17th day of March, 1897, the defendants, without leave of Court, renewed said motion under precisely the same circumstances as existed when the motion was first made. (Trans. 94.) And on the 12th

day of April, 1897, Judge Morrow granted said motion, and refused to allow the complainant any time in which to take testimony in support of his bill. (Trans. 100.)

It is a well settled principle of law and practice in this State, that a motion renewed without leave of Court should be denied.

Reed vs. Allison, et al., 54 Cal., 490.
Ford vs. Doyle, 44 Cal., 637.

In the Federal Courts it has been held that a Judge will rarely refuse to follow a ruling made by one of his colleagues in the same or a similar case.

Cole S. M. Co. vs. Va. and G. H. Water Co., 1 Saw., 685.

Waklee vs. Davis, 44 Fed. Rep., 532.

Warswick Mf'g Co. vs. City of Phila., 30 Fed. R., 625.

4.—On the 31st day of March, 1897, while the pleadings were unsettled and the issues undetermined by reason of complainant's motions to strike our portions from the answers of the defendants, to strike said answers off the files, and for judgment on the pleadings, the defendants moved the Court to set said action for hearing on bill and answers. (Trans. 95). All four of said motions were submitted at the same time. Subsequently the Court denied all of complainant's motions,

and ordered a decree for the defendants before the complainant had notice that the issues were settled. This was equivalent to deciding the case before the issues were determined.

5.—The complainant should have been allowed a reasonable time, or at least three months from the settlement of said issues, in which to take testimony in support of his bill.

Equity Rules, No. 69.

6.—The law and the rules of practice in Courts of Equity, prescribe no time within which such motions may be made. The defendants can not complain because the complainant waited a reasonable time for them to make their answers conform to the requirements of the rules of court. before renewing his motion to strike them off the files for want of a proper certificate of counsel.

If said motions of complainant were not made in time, the defendants should have moved to strike the same from the files on that ground. By consenting to a continuance from time to time and setting them down for hearing on the merits, the objection was waived.

Foster's Fed. Practice, Vol. I, sections 152, 153, 139, 119.

Daniel's Ch. Practice (2 Am. ed.), 661-663.

Ewing vs. Blight, 3 Wall, Jr., 134.
Curzon vs. De La Zouch, 1 Swanst, 193.

It is contended by defendants that a motion to strike out is a proceedure unknown to the Federal practice. The authorities do not support this assertion.

Armstrong vs. Chem. Nat'l Bank, 37 Fed. Rep., 466.
U. S. vs. Stone, 106 U. S., 525.
Gilchrist vs. Helena etc. Ry. Co., 47 Fed. Rep., 593.

A demurrer or exceptions can not reach redundant, sham or irrelevant matter; it can only be expunged on motion.

Adams vs. Bridge Iron Co., 6 Fed. Rep., 179.
B. B. R. Iron Co. vs. W. R. Iron Co., 43 Fed. Rep., 391.

7.—Judgment should have been rendered in favor of the complainant on the pleadings. It is alleged in the bill that only a portion of the estate of Carpenter was devised to Bailey's children, and that Clinton H. Carpenter was one of the heirs and successors in interest of his late brother in respect to the land in controversy. (Trans. pg. 6.) These allegations are admitted by the defendants. Therefore, the title to

said land vested in Clinton at his brother's death. This, together with the other admissions of the defendants, and the allegations of the bill is a solution of the whole case, and renders a consideration of the technical objections of the defendants' unnecessary.

8.—All of the sham, irrelevant, impertinent and redundant matter and conclusions of law pleaded in said answers should have been stricken out on motion. The denial of a conclusion of law raises no issue, and the facts are deemed admitted.

Nelson vs. Murray, 23 Cal. 338.

Turner vs. White, 73 Cal., 299.

Adams vs. Adams, 21 Wall., 185.

U. M. Ins. Co. vs. C. M. M. Ins. Co., 2 Curt., 524.

Sham, impertinent and redundant matter should be expunged on motion, although responsive to allegations in the bill.

9.—Defendant Cunningham was an executive officer and the Sheriff who made the sale of the property. As such officer he had no interest in the matter of the redemption. He can not contest or litigate, legally or equitably, either as plaintiff or defendant, a matter in which he has no interest. This is a too well settled principle of law to need the citation of authorities.

10.—Defendant O'Connor was the mortgagee, and his interest in the matter of the redemption was a lien on the property for the amount invested in his mortgage note.

Curtis vs. Millard. 81 Am. Dec., 460.
Reynolds vs. Harris, 14 Cal., 667.
McMillan vs. Richards, 9 Cal., 365.
Crassen vs. White, 87 Am. Dec., 420.

Having been tendered the full amount of that lien by one of the defendants in his action of foreclosure, he had no right, legal or equitable, to contest such redemption.

Jones vs. Black, 48 Ala., 540.
Dejornette vs. Haynes, 23 Miss., 600.

And a Court will not allow a mortgagee to urge, by way of defense, that the right of redemption impairs the obligation of a contract.

Sullivan vs. Berry, 4 Am. S. Rep., 147.
Williamson vs. Carlton, 51 Me., 449.

Or that a second mortgage under which a redemptioner offered to redeem was fraudulent.

Baldwin vs. Burt, 61 N. W., 601.
Hovey vs. Tucker, 50 N. W., 1038.

Or that there was other fraud on the part of the redemptioner.

Bradley vs. Snyder, 14 Ill., 263.

Livingston vs. Ives, 35 Minn., 55.

Or that the complainant is not the owner of the right of the redemption.

Jones on Mortgages, Vol. II, section 1105.

Or that some person other than the redemptioner furnished the money.

Seale vs. Doane, 17 Cal., 477.

Or that there was no consideration between the assignee and assignor for the right of redemption, or the former's object in obtaining it.

Jones on Mortgages, Vol. II, section 1105.

Or that the claim under which the redemption was made was irregular.

Schuck vs. Gerlach, 101 Ill., 342.

Powers vs. Russell, 13 Pick., 69.

Or that the mortgagor has not a valid title to the mortgaged premises.

Lorenzano vs. Camarillo, 45 Cal., 128.

Powell on Mortgages, Vol. I, 408.

As long as the lien of the mortgage was recognized and secured, it was no business of the mortgagee who held the right of redemption or what became of it.

Bradley vs. Snyder, 58 Am. Dec., 565.

If the Sheriff receives the money from one not entitled to redeem, that does not prejudice the party holding the certificate of sale.

Horton vs. Maffitt, 100 Am. Dec., 222.

11.—When the defendant O'Connor foreclosed his mortgage upon the property in controversy, he made Clinton H. Carpenter a party defendant therein, and alleged that he was an heir at law of his deceased brother, and thereby had an interest in said realty. (Trans. 6.) In his answer herein he alleges that he made Clinton a party to cut off this right of redemption. (Trans. 40.) These allegations are clearly an admission that the right exists and should estop him from denying his and his creditor's right to redeem.

12.—All questions as to the vesting of the property in controversy in the heirs at law, or the validity or invalidity of the alleged will of C. W. Carpenter, is really eliminated from consideration in this case, as is shown in paragraph No. 7 herein; but for the purpose of showing the fallacy of the claim that, in case of a voidable will, the title to real property vests in the legatees, it may be said that if that theory be correct, the realty included in C. W. Carpenter's will vested first in the legatees, then in the heirs at law at the termination of the first contest, and, depending upon the status of the will, changed from one to the other four times. If, after

the next trial, it should finally be adjudged void, the realty would, on the fifth change, vest in those naturally entitled. Such a theory is absurd.

Real property vests in the heirs at law until it has been finally adjudicated that it belongs to others not naturally entitled.

Legatees' rights are contingent, and depend upon the final establishment of the will.

If the will is not probated and finally declared valid, the legatees take nothing thereunder. Hence, no real property vests in them until their rights are finally determined.

It has been held in this State that where a will is void or voidable, as to persons naturally entitled to inherit the property, the realty vests immediately after the testator's death in the heirs at law *notwithstanding the will.*

Smith vs. Olmstead, 88 Cal., 582.
Estate of Wardell, 57 Cal., 489.
Pearson vs. Pearson, 46 Cal., 627.

13.—All the interest of a deceased partner in partnership real property vests in the heirs at law, and not in the surviving partner.

Redfield on Wills, Vol. III, pg. 143.
Washburn on Real Property, Vol. I, pgs. 702-4.

Bates on Partnership, sections 293 and 712.
Freeman on Executions, Vol. I, section 183.
Parson on Contracts, Vol. I, pg. 169; note.

The surviving partner has merely an equity in such property for the payment of the partnership debts.

McNeil vs. Cong'l Soc., 66 Cal., 106-110.
Stokes vs. Stevens, 40 Cal., 394.
Lowe vs. Alexander, 15 Cal., 298.

14.—Upon the death of the owner, all his real property vests immediately in the heirs at law, and does not await the decree of distribution. This is a primary principle of law, and does not require the citation of authorities.

15.—It is admitted by the defendants that Clinton H. Carpenter was a party defendant in the action foreclosing the mortgage and that he was made a defendant therein for the purpose of cutting off his right of redemption in said real property. The judgment divested Clinton of his property, and it is immaterial whether it was land or money. The judgment and execution having run against his interest in the land, it gave him and his creditor the right to redeem it.

Yoakum vs. Bower, 51 Cal., 540.
Whitney vs. Higgins, 10 Cal., 554.
Hall vs. Arnott, 80 Cal., 355.

And he has a right to redeem, although he has no interest in the mortgaged property.

Lorenzano vs. Camarillo, 45 Cal., 125.

Yoakum vs. Bower, *supra.*

This is decisive of the whole case, and is sufficient alone to entitle the complainant to redeem.

A judgment creditor may redeem.

C. C. P., section 701.

Kent vs. Laffan, 2 Cal., 596.

McMillan vs. Richards, 9 Cal., 366.

Brainard vs. Cooper, 10 N. Y., 361.

Schuck vs. Gerlach, 101 Ill., 338.

And the judgment need not be a lien upon the real property.

Schroeder vs. Bauer, 41 Ill. App., 484.

Plase vs. Ritch, 132 Ill., 638.

Karnes vs. Lloyd, 52 Ill., 113.

16.—A contingent interest is sufficient to entitle one to redeem.

Bacon vs. Bowdon, 22 Pick., 401.

Davis vs. Wetherell, 13 Allen, 63.

Jones on Mortgages, section 1065.

Under the referee's award, Clinton's and his brother's interest in the estate was adjudged to be $11,256. This, aside from his other interests, gave him a vested

interest in the estate, and entitled him to redeem.

Smith vs. Austin, 9 Mich., 474.
Frisbee vs. Frisbee, 86 Me., 444.
Spenc's Eq. Juris, Vol. II, pg. 660.
Story Eq. Juris, Vol. II, section 1023.
Pingrey on Mortgages, Vol. II, section 215.
Bell vs. Mayor of N. Y., 10 Paige Ch., 56.

"The right of redemption exists, not only in the "mortgagor himself, but in his heirs and personal "representatives, and assignees, and in every other "person who has an interest in, or a legal or equitable "lien upon, the lands, * * and doubts as to the "*extent* of the right to redeem beyond the mortgagor "and his representatives, arise only in the courts of "*limited* and not of general equity jurisdiction."

Kent's Com., Vol. IV, 162; cases cited.
Lewis vs. Nagle, 2 Ves. Sr., 431.
Boone on Mortgages, section 160.
Pardee vs. Van Anken, 3 Barb., 537.
Gatewood vs. Gatewood, 75 Va., 407.
Butts vs. Broughton, 72 Ala., 298.
Wash. on Real Prop., 553.
Boquet vs. Coburn, 27 Barb., 230.
Gower vs. Winchester, 33 Ia., 305.

17.—When a cause is heard on bill and answer, allegations in the answer that are not responsive to

matters in the bill, are not evidence.

Sargent vs. Larned, 2 Curt., 340.
Seitz vs. Mitchell, 94 U. S., 580.
Atty. Gen'l vs. Steward, 21 N. J., Eq. 340.

Nor are denials on information or belief.

Berry vs. Sawyer, 19 Fed. Rep., 286.
Allen vs. O'Donald, 28 Fed. Rep., 17.

Nor are allegations or denials of conclusions of law.

Adams vs. Adams, 21 Wall., 185.
Union M. Ins. Co. vs. Com. M. M. Ins. Co., 2 Curt., 524.

18.—Applying the law laid down in the foregoing paragraph to the answer of the defendant Cunningham, the following denials and allegations could not be considered as evidence on such a hearing, namely:

That complainant was a citizen of Illinois (pg. 47); That the pretended will was the last will and testament of C. W. Carpenter (pg. 48); That the claims of all persons interested in said estate were presented to the referee (pg. 51); That some of said parties were minors (pg. 51); That the heirs of C. W. Carpenter were entitled to the realty in controversy (pg. 52); That Clinton had a right to redeem (pg. 54); That complainant's judgment became a lien (pg. 54); That the value of the real property was $34,770 (pg. 56);

That C. K. Bailey is wrongfully carrying on said partnership business (pg. 56).

And also the following from the answer of the defendant O'Connor, namely: That complainant was a citizen of Illinois (pg. 29); That the form of the agreement of reference was as specified (pg. 31); That said real property constituted a part of the assets of the estate of Carpenter (pg. 40); That said heirs were not proper parties to said suit of foreclosure (pg. 40); That no personal judgment was taken except against C. K. Bailey (pg. 41); That complainant's judgment was a lien (pg. 42); That said judgment was assigned to complainant (pg. 42); That complainant never had a lien (pg. 43); That no redemption had ever been made (pg. 43); That C. K. Bailey had nearly wrecked said estate (pg. 43); That said realty was sold for the purpose of defrauding the heirs and said redemption prevented by the collusive acts of the defendants (pg. 44); That C. K. Bailey now claims an interest in said property (pg. 44).

Excluding all the allegations of which the foregoing are a brief syllabi, it leaves nearly all the allegations in the bill of complaint undisputed, and, among others, the following, namely:

That Clinton H. Carpenter succeeded to the interest of his late brother in respect to the land in controversy;

That complainant's judgment was a lien upon that interest; That he took the necessary steps to redeem the land, and was prevented from so doing by the defendants, who were in collusion with the defendant Bailey to defraud the heirs of C. W. Carpenter of that portion of their inheritance.

Such a showing in a Court of Equity, in connection with the other allegations in the bill, ought to entitle the complainant to the relief prayed for, when the granting of the same could work no injury to the defendants, and the refusal thereof might deprive the heirs of their entire inheritance.

19.—The right of heirs at law to redeem is recognized by all courts, otherwise they might lose their entire interest in their ancestor's estate.

Moore vs. Beasom, 44 N. H., 218.
Stark vs. Brown, 78 Am. Dec., 762.
Story Eq. Juris, section 1023.
Pow. Eq. Juris, Vol. III, section 1220.
Teedeman on Real Prop., section 334.
Freeman on Executions, section 317.
Scott vs Henry, 13 Ark., 122.

If the heirs at law are disinherited and they contest the will, they have the right to redeem.

Jones on Mortgages, sections 1062, 1418.
Davis vs. Witherell, 13 Allen, 63.

In a case similar to the one at bar the Supreme Court of Alabama said:

"Although the instrument propounded as the will "of Samuel Acre purported to give the mortgaged "premises to his widow, and although it was in the "first instance admitted to probate as his will; yet "for five years thereafter the right by statute existed "in his heirs to contest its validity by bill in chancery. "The existence of this right and its actual assertion "by their bill, made them proper parties to Hunt's "suit for foreclosure. * * * His election to proceed "without them to a decree and to a purchase under "that decree was made at his own peril and can not "be allowed to operate so as to impair their right to "redeem."

Hunt, et al. vs. Acre, et al., 28 Ala., 596.

If the mortgagee receives the amount of his mortgage note, he can not be injured by the redemption. If the complainant's right is denied he loses his judgment and the heirs lose all their right in that portion of their deceased brother's estate.

In this State there are two distinct methods of redeeming real property from a mortgage sale, and two separate rights of redemption are provided by the codes and recognized by the courts. One is the statutory right.

Code of Civil Procedure, sections 701-707

And the other is the equitable right.

Civil Code, section 2903.
Hall vs. Arnott, 70 Cal., 348.
Tuol. Redem. Co. vs. Sedgwick, 15 Cal., 527.
Whitney vs. Higgins, 10 Cal., 547.
Montgomery vs. Tutt, 11 Cal., 307.
Eldredge vs. Wright, 55 Cal., 531.

The complainant complied with all the provisions laid down under the statutory right, and was denied the privilege. He then instituted this action in equity to enforce the right. Section 2903 of the C. C. provides that "every person, having an interest in property subject to a lien, has a right to redeem it from that lien."

As to the interpretation of this legal and equitable right, the Supreme Court of this State has said:

"There is no good reason why the statute, which is "remedial in its character, should receive a narrow con- "struction in order to defeat the right of redemption " which it intended to give."

Yoakum vs. Bower, 51 Cal., 540.
Schuck vs. Gerlach, 101 Ill., 338.

"A court of equity will assist all persons claiming "in equity of redemption, unless their title is directly "against conscience."

Powell on Mortgages, pgs. 334, 261.

"The Court looks with jealousy on all attempts to "impair or embarass the exercise of the right of re-"demption."

Willard's Eq. Juris, 448.

"The right of redemption is a favorite equity."

Chicago D. & V. Ry. Co. vs. Fosdick, 106 U. S., 47.

There is no equity in the defendants' claims, and the same should be disregarded in order that justice may be done in the matter.

Walkerly vs. Bacon, 85 Cal., 141.
Johnston vs. S. F. Savings Union, 75 Cal., 134.
Weyant vs. Murphy, 78 Cal., 283.

The complainant having tendered a sufficient sum to redeem, the Sheriff had no power to execute a conveyance to the defendant.

Hershey vs. Dennis, 53 Cal., 80.

We submit that the judgment herein should be re-reversed, and that this Honorable Court direct the entry of a decree in the lower court in favor of complainant, which will finally dispose of all matters in con-

troversy herein as by law provided in cases in equity.

Blease vs. Garlington, 92 U. S., 1.

Penhallow vs. Doane, 3 Dalles, 54.

Wickliff vs. Owings, 17 How., 47.

Respectfully submitted,

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